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JUL 15 2008

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re

Case No. 07-27982-A-7 ✓

ROYCE LEE MAKISHIMA and TERRA
ANN MAKISHIMA,

Debtors.

GRACE MILES,

Adv. No. 08-2006

Docket Control No. None

Plaintiff,

vs.

Date: Ex Parte
Time: Ex Parte

ROYCE LEE MAKISHIMA and TERRA
ANN MAKISHIMA,

Defendants.

MEMORANDUM

Plaintiff Grace Miles has filed a motion for a stay pending appeal. The motion was filed in this adversary proceeding and not in the main case.

However, there is no appeal pending in the adversary proceeding. For this reason, the court will deny the motion for a stay pending appeal insofar as it seeks to stay anything related to the adversary proceeding.

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1 The only appeal filed by Ms. Miles concerns a matter in the
2 main bankruptcy case. Her notice of appeal was filed on May 13,
3 2008. That appeal concerns an order filed on April 29, 2008 and
4 entered on the docket on April 30, modifying the automatic stay
5 in order to permit a state court to enter judgment in an action
6 that pre-dated the bankruptcy case.

7 To the extent the motion for a stay pending appeal actually
8 seeks to stay the effect of the April 29 order, the motion will
9 be denied.

10 Fed. R. Bankr. P. 8005 permits the bankruptcy court to grant
11 a stay pending appeal concerning one of its orders provided the
12 appellant makes a strong showing that (1) she is likely to
13 succeed on the merits, (2) she is likely to sustain irreparable
14 injury without the stay, (3) the appellee is unlikely to be
15 injured by a stay, and (4) the public interest will not be harmed
16 if the stay is granted. See Wymer v. Wymer (In re Wymer), 5 B.R.
17 802, 806 (B.A.P. 9th Cir. 1980).

18 Here, Ms. Miles' motion has offered no evidence, or
19 argument, on any of these points. Nonetheless, a cursory review
20 of the record suggests that the appeal is doomed because it was
21 not filed timely.

22 Fed. R. Bankr. P. 8002(a) requires that a notice of appeal
23 be filed within 10 days of the date of the entry of the order.
24 None of the provisions of Rule 8002 providing for an extension of
25 the time to file a notice of appeal are applicable in this case.

26 For instance, no party filed a motion for reconsideration
27 under Fed. R. Bankr. P. 9024 (or any of the other motions
28 enumerated in Fed. R. Bankr. P. 8002(b)) during the 10-day appeal

1 period. Had such a motion been filed, the time to file a notice
2 of appeal would have been extended until 10 days following the
3 entry of the order disposing of such motion.

4 Nor did Ms. Miles seek an extension of the time to appeal,
5 either during the initial 10-day appeal period or, assuming the
6 failure to file a notice of appeal during the 10-day appeal
7 period was due to excusable neglect, within 20 days after the
8 expiration of the 10-day appeal period. See Fed. R. Bankr. P.
9 8002(c)(2). Assuming that there was a basis for an extension, it
10 is now too late to seek an extension under Rule 8002(c)(2) - both
11 the 10-day and 20-day periods have expired.

12 Furthermore, even if the times to request an extension had
13 not expired, Fed. R. Bankr. P. 8002(c)(1)(A) does not permit the
14 court to grant an extension of time to appeal an order granting
15 relief from the automatic stay.

16 Hence, Ms. Miles cannot possibly prevail because her appeal
17 was untimely. Assuming Ms. Miles is seeking a stay pending
18 appeal in connection with the order granting relief from the
19 automatic stay, it cannot be granted for the reasons explained
20 above.

21 The court, however, construes the motion seeking a stay
22 pending appeal also to be a request for a continuance of the
23 upcoming August 11 hearing on the defendants' motion to dismiss
24 the adversary proceeding. That dismissal motion was filed March
25 12, 2008 and has twice been continued at Ms. Miles' request.

26 At a hearing on May 27, the court agreed to continue the
27 hearing on the motion to dismiss to August 11. The court
28 explained its reasons for doing so in a written ruling that is

1 appended to the minutes of the hearing. In that ruling, the
2 court concluded:

3 The defendants, Royce and Terra Makishima, who are also
4 the debtors in the underlying bankruptcy case, move for
5 dismissal of the plaintiff's first amended complaint
6 under Fed. R. Civ. P. 12(b)(6).

7 The plaintiff seeks a "stay" of further prosecution of
8 this proceeding while she searches for an attorney.

9 The hearing will be continued to August 11, 2008 at
10 9:00 a.m., both to give the plaintiff additional time
11 to search for an attorney and for the reason explained
12 below. Pending a further order of this court, the
13 defendants shall not be required to answer the
14 complaint and the parties shall conduct no discovery in
15 this proceeding.

16 However, pending the continued hearing, the court will
17 grant the motion to a limited extent in order to
18 clarify that the plaintiff is not pursuing a claim for
19 relief under 11 U.S.C. § 727(a), but is pursuing a claim
20 that a liability of the defendants to the plaintiff is
21 made nondischargeable by 11 U.S.C. § 523(a)(2), (4) or
22 (6). The plaintiff confirmed this at the hearing on
23 May 27.

24 Accordingly, when the defendants are otherwise entitled
25 to a bankruptcy discharge, it may be entered by the
26 clerk, but that discharge is subject to a possible
27 determination in this proceeding that the liability of
28 the defendants to the plaintiff is excepted from their
discharge.

To the extent the original and amended complaints seek
relief under 11 U.S.C. § 523(a)(2), (4), or (6), that
relief is related to certain state court litigation
referenced in the original and amended complaints filed
in this court. The plaintiffs is seeking a
determination that the defendants' liability to her in
the state court litigation should be excepted from
their bankruptcy discharge.

It appears that a trial was concluded in state court
before the bankruptcy petition was filed. However, the
state court did not announce a decision until after the
petition was filed. This was done after the automatic
stay of 11 U.S.C. § 362(a) was in place. For that
reason, the defendants/debtors and trustee sought to
annul and modify the automatic stay in order to permit
the state court to enter judgment in accordance with
its announced decision. This court granted that
relief.

1 As of yet the state court has not entered its judgment.
2 In fact, the plaintiff has removed the state court
3 litigation to the Bankruptcy Court of the Northern
4 District of California. The defendants intend to seek
5 a remand.

6 In addition to providing time to the plaintiff to
7 obtain counsel, the purpose of the continuance is to
8 permit the defendants to seek a remand from the
9 Northern District and to obtain entry of a judgment,
10 whether from the state court or from the Northern
11 District if the remand is not granted. If a judgment
12 is obtained, at the continued hearing the court will
13 determine whether there is any liability owed by the
14 defendants to the plaintiff that can be excepted from
15 their discharge. Also, the plaintiff is free, given
16 the court's annulment and modification of the automatic
17 stay, to pursue any appeal or trial court attack on a
18 state court/Northern District judgment.

19 Because of Ms. Miles has yet to obtain an attorney, because
20 the Northern District has not yet acted on the motion to remand,
21 and because no judgment has been entered by the state court after
22 a remand, the court will grant a further continuance of the
23 hearing on the dismissal motion to September 8, 2008 at 9:00 a.m.

24 This Memorandum, and the accompanying order, shall be filed
25 in both the main case and in the adversary proceeding.

26 Dated: 15 July 2008

27 By the Court

28 

Michael S. McManus, Chief Judge
United States Bankruptcy Court

CERTIFICATE OF MAILING

I, Susan C. Cox, in the performance of my duties as a
judicial assistant to the Honorable Michael S. McManus, mailed by
ordinary mail to each of the parties named below a true copy of
the attached document.

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Dated: July 16, 2008



Susan C. Cox
Judicial Assistant to Judge McManus